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JDAC
9200#11
3641

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE THE APPLICATION OF:

Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00

For: **METHOD AND APPARATUS
TO MONITOR LOADING
USING VIBRATION**

This is a continuation of Serial no. 07/371,937

Filed: 06/27/89

PAPER: 7 (Applicant's Count)

Group Art Unit:3641

Examiner: R. Palabrica

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NOV 0 8 2002

OFFICE OF PETITIONS

October 23, 2002

Commissioner of Patents and Trademarks
Washington, D.C. 20231

**PETITION TO THE COMMISSIONER
PURSUANT TO 37 C.F.R. 1.181**

1. This Petition is made pursuant to 37 C.F.R. 1.181 to the Commissioner of Patents, and is made to invoke his supervisory authority to correct a wrongful situation involving a "Notice Of Abandonment" [Exhibit "A" attached, hereinafter "Notice"] dated 9/9/02 and just received. Pursuant to 37 C.F.R. 1.181, there is no fee. This Petition is reasonable based upon the reasons stated below, including that the date-stamp of the Office demonstrates that there was no abandonment [Exhibit "B" attached], and the facts as discussed in the Declaration supporting this Petition.

2. In the discussion below, reference is made to Declaration of Dr. Mitchell Swartz (hereinafter called the "Swartz Declaration") dated October 23, 2002.

3. As discussed in the Swartz Declaration, Applicant received a "Notice Of Abandonment" [Exhibit "A" attached, hereinafter "Notice"] dated 9/9/02 and just received. Said communication is a Notice which states that the application has been "*Abandoned*". There is a major error in said communication from the Office. As stated in the Swartz Declaration,

"This Applicant has NEVER abandoned this patent application. No communication to the Office from the Applicant has ever used the word "abandonment". "

4. As stated in the Swartz Declaration, Applicant submitted a Response to the Office's Action which was dated 1/16/02 and was unsigned and unnumbered.

"I submitted a Response to the Office's Action which was dated 1/16/02 and was unsigned and unnumbered."

5. Said Response was received at the Patent and Trademark Office on July 16, 2001 (Exhibit "B", attached). As stated in the Swartz Declaration,

"The datestamp of the Patent and Trademark Office (Exhibit "B", attached) indicates that the pleading with said Exhibits was received and docketed 3/1/02."

6. Said Response (Exhibit "C", attached) was accompanied by a Petition to the Commissioner (cover of which is Exhibit "D", attached) supported by an Affidavit (cover of which is Exhibit "E", attached). All three pleadings were received as proven by the Office's datestamp (Exhibit "B", attached). As stated in the Swartz Declaration,

"Also submitted with the Response (Exhibit "C") was a Petition to the Commissioner under 1.181 (Exhibit "D", attached), accompanied by a supporting Declaration (Exhibit "E", attached). These additional important pleadings were received at the Patent and Trademark Office as proven by the Office's datestamp (Exhibit "B").

The datestamp of the Patent and Trademark Office [Exhibit "B"] heralds receipt of Applicant's Response to the Office's Action dated 1/16/02, which was unsigned and unnumbered, and this indelibly demonstrates that there was no abandonment."

NOTA BENE: It is obvious the application was never abandoned because the Appellant has continued to submit pleadings, and entered a Petition to the Commissioner supported by a Declaration -- which the Examiner has removed from the file AFTER RECEIPT AS CONFIRMED BY THE STAMP OF THE HONORABLE POSTOFFICE.

7. Said pleadings have simply been ignored by someone at the Office or removed from the file, who thereafter falsely checked off, "No reply has been received". In fact, someone at the Office knew that there was a Petition to the Commissioner in the file because it was received and acted upon.

Someone at the Office knew there was a Response because the Response was received (Exhibit "B"). Attention of the Commissioner and the court are directed to the obvious fact that once again, someone at the Office has spoliated submitted evidence to egregiously and systematically hurt the Applicant's application.

8. Even though said records were received, and even though the Commissioner has been informed of wrongful conduct (as has the Federal court), Applicant submits a new copy, which are attached hereto as Exhibit "C".

9. This Petition to reverse the Abandonment of the present invention is reasonable and should be granted because of any of the following reasons.

- A . The date-stamp of the Office [Exhibit "B" demonstrating receipt of Exhibits "C", "D", and "E"] **proves that there was no abandonment**
- B . Someone at the Officer has on more than one occasion removed papers from Applicant's file(s). In the present case, someone has removed or ignored the Response [Exhibit "C"] -- which was received [Exhibit "B"]. This is spoliation of Office (federal) files.

10. For the above reasons, documented by the record, supported by the Law, and consistent with the date-stamps of the Office which indelibly prove that Applicant filed a timely, received [Exhibit "B"] Response, it is respectfully requested that the Commissioner use supervisory authority to immediately activate and revive the above-entitled application, and to cause to cease and desist whomever is spoliating submitted evidence under the Commissioner, even after the Commissioner was notified of such spoliation by registered mail prior to this latest event.

Respectfully submitted,



Mitchell Swartz, ScD, MD, EE
Post Office Box 81135
Wellesley Hills, Mass. 02481

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OFFICE OF PETITIONS

Certificate Of Mailing [37 CFR 1.8(a)]

October 23, 2002

To Whom it Does Concern:

I hereby certify that this correspondence will be deposited with the United States Postal Service by First Class Mail, postage prepaid, in an envelope addressed to
"The Commissioner of Patents and Trademarks
Washington, D.C. 20231" on the date below.
Thank you.

Sincerely,

October 23, 2002



M.R. Swartz



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/750,480

12/28/2000

Mitchell R. Swartz

7970

7590

09/09/2002

Mitchell R. Swartz, ScD, EE, MD
16 Pembroke Road
Weston, MA 02493



EXAMINER

PALABRICA, RICARDO J

ART UNIT

PAPER NUMBER

3641

DATE MAILED: 09/09/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

EXHIBIT "A"
Page 1 of 2

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OFFICE OF PETITIONS



Notice of Abandonment

Application No.

09/750,480

Examiner

Rick Palabrica

Applicant(s)

SWARTZ, MITCHELL R.

Art Unit

3641

- The MAILING DATE of this communication appears on the cover sheet with the correspondence address-

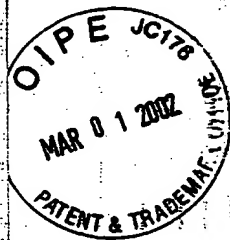
This application is abandoned in view of:

1. ☒ Applicant's failure to timely file a proper reply to the Office letter mailed on 16 January 2002.
 - (a) ☐ A reply was received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the period for reply (including a total extension of time of _____ month(s)) which expired on _____.
 - (b) ☐ A proposed reply was received on _____, but it does not constitute a proper reply under 37 CFR 1.113 (a) to the final rejection.
(A proper reply under 37 CFR 1.113 to a final rejection consists only of: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114).
 - (c) ☐ A reply was received on _____ but it does not constitute a proper reply, or a bona fide attempt at a proper reply, to the non-final rejection. See 37 CFR 1.85(a) and 1.111. (See explanation in box 7 below).
 - (d) ☒ No reply has been received.
2. ☐ Applicant's failure to timely pay the required issue fee and publication fee, if applicable, within the statutory period of three months from the mailing date of the Notice of Allowance (PTOL-85).
 - (a) ☐ The issue fee and publication fee, if applicable, was received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the statutory period for payment of the issue fee (and publication fee) set in the Notice of Allowance (PTOL-85).
 - (b) ☐ The submitted fee of \$ _____ is insufficient. A balance of \$ _____ is due.
The issue fee required by 37 CFR 1.18 is \$ _____. The publication fee, if required by 37 CFR 1.18(d), is \$ _____.
 - (c) ☐ The issue fee and publication fee, if applicable, has not been received.
3. ☐ Applicant's failure to timely file corrected drawings as required by, and within the three-month period set in, the Notice of Allowability (PTO-37).
 - (a) ☐ Proposed corrected drawings were received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the period for reply.
 - (b) ☐ No corrected drawings have been received.
4. ☐ The letter of express abandonment which is signed by the attorney or agent of record, the assignee of the entire interest, or all of the applicants.
5. ☐ The letter of express abandonment which is signed by an attorney or agent (acting in a representative capacity under 37 CFR 1.34(a)) upon the filing of a continuing application.
6. ☐ The decision by the Board of Patent Appeals and Interference rendered on _____ and because the period for seeking court review of the decision has expired and there are no allowed claims.
7. ☐ The reason(s) below:

EXHIBIT "A"
page 2 of 2

MICHAEL J. BARONE
SUPERVISORY PATENT EXAMINER

Patent applicants may revive under 37 CFR 1.137(a) or (b), or requests to withdraw the holding of abandonment under 37 CFR 1.181, should be promptly filed to minimize any negative effects on patent rights.



The date stamp of the United States Patent Office
on this postcard will indicate receipt of:

1. "Response of Applicant to Office's unsigned
unnumbered Notice", with a Certificate of mailing
on the last page thereof, and
 2. Applicant's Petition To the Commissioner
Pursuant to 37 C.F.R. 1.181
 3. Declaration of Dr. Mitchell Swartz
Supporting Petition, and
 4. This self-addressed stamped postcard.
- S.N. C. 750, 480 Filed: 12/28/00

Thank you.

Mailed: February 12, 2002 Mitchell Swartz

EXHIBIT "B"

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NOV 08 2002

OFFICE OF PETITIONS

The date stamp of the United States Patent Office on this postcard will indicate receipt of:

1. "Response of Applicant to Office's unsigned summary of 'red Notice', with a Certificate of mailing on the last page thereof, and

2. Applicant's Petition To the Commissioner Pursuant to 37 C.F.R. 1.181

3. Declaration of Dr. Mitchell Swartz

Supporting Petition, and

4. This self-addressed stamped postcard.

S.N. 750, 480 Filed: 12/28/00

Thank you.

Mailed: February 12, 2002 Mitchell Swartz



EXHIBIT "B"
(MAGNIFIED)



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

COPY

IN RE THE APPLICATION OF:

Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00

For: **METHOD AND APPARATUS
TO MONITOR LOADING
USING VIBRATION**

PAPER: 5 (Applicant's Count)

Group Art Unit:3641

Examiner: Behrend, H.

EXHIBIT "C"

This is a continuation of Serial no. 07/ 371,937

Filed: 06/27/89

February 12, 2002

**Applicant's Response to Examiner's
Unsigned Unnumbered Notice**

REMARKS

1. This is Applicant's Response to the Office's Notice dated 1/16/02 (Exhibit A, attached) which was unsigned and unnumbered.

2. Applicant thanks the Examiner for the attention to detail. Applicant reminds the Examiner that his Notice is inconsistent with the Office's previous actions of this invention, and that the Examiner has not addressed the issues which the Applicant brought up (*infra*).

3. Applicant acknowledges the objection to the drawings. Said objections are noted and will be corrected after allowance.

COMMENTS

RESPONSE AND COMPLIANCE REGARDING SECTION 2

4. The Examiner states:

"The reply filed on 6/4/01 is not fully responsive to the prior Office action because of the following omission(s) or matter(s): The 6/4/01 response failed to elect a specie from the grouping set forth in section 2 on page 2 of the 5/7/01 Office action, and, to provide a

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listing of all claims readable thereon. ... The examiner does not agree that the examiner is precluded from making the present restriction requirement due to actions by a different examiner in the parent case. Each applicant (and its accompanying claims) are treated on their own merits. See particularly MPEP 811.04 which states: Even though inventions are grouped together in a requirement in a parent application, restriction or election among the inventions may be required in the divisional applications, if proper. Applicant has not shown the election of species requirements set forth on pages 2-3 of the 5/7/01 Office action, to be improper or in error."

[Unsigned, unnumbered Notice from Mr. Harvey E. Behrend, 1/16/02]

With all due respect, the final sentence by the Examiner is incorrect. First, in the communication from the Applicant, dated May 31, 2001, Applicant has shown the election of species requirements set forth on pages 2-3 of the 5/7/01 Office action, to be improper or in error for several reasons. The first occurs when it is viewed in the light of the original application and the Office's previous demands on the Applicant.

The Examiner has not responded to what Applicant said, that the original specification, claims and drawings of Serial no. 07/371,937 have already gone through a restriction by the Primary Examiner Daniel Wasil on September 16, 1991.

Serial No. 07/371937

Art Unit 224

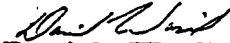
-2-

Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 1-6, 19, drawn to apparatus and method for producing a vibrational frequency of a cathode, classified in Class 376, subclass 100.

II. Claim 7, drawn to a system to monitor nuclear fusion reactions that comprises microwave radiation, classified in Class 376, subclass 245.

III. Claims 8-9, 20-22, 25-26, drawn to apparatus and method for accelerating nuclear fusion reactions, classified in Class 376, subclass 100.


Daniel Wasil
Primary Examiner
Art Unit 224

5. Second, the Examiner has also ignored what Applicant said regarding Examiner's re-restriction is not proper in light of 37 CFR 1.142 because the Examiner has not explained why -given Examiner Wasil's previous restriction- the latest re-restriction can support separate patents which are independent [37 CFR §1.142, (MPEP §806.04 - §806.04(j))] and [37 CFR §1.142]/or [MPEP §806.05 - §806.05(i)] distinct.

6. Third, if the Examiner has also ignored that the Applicant has warned him that he is improper because as the Court has found:

"Respondents' claims must be considered as a whole, it being inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis." [Diamond v. Diehr, 450 U.S. 175 (1981), 450 U.S. 175, No. 79-1112, 3/3/81]

7. Fourth, the Examiner has also ignored that the fact that the Applicant has notified him that he is attempting to coerce the Applicant into double patenting.

8. Fifth, the Examiner has also ignored the fact that the Applicant has noted that the Examiner's demand is not proper in light of MPEP §808 because given Examiner Wasil's previous restriction, Mr. Behrend has not given any substantive foundation.

9. Therefore, Applicant has stated at least five (5) reasons why the requirement should be withdrawn or modified. Applicant has pointed out errors in the Examiner's action. Not one of these issues has been responded to by the Examiner, despite the fact that there was obligation on the Examiner to respond because Applicant satisfied his burden by citing the above issues.

10. Applicant elects II - figure 2. All claims read on the elected species.

Applicant hereby preserves the Right of Petition.

RESPONSE AND COMPLIANCE REGARDING SECTION 5

11. The Examiner has stated:

"On page 9 of the 6/4/01 response, applicant appears to have indicated he has not elected a species as required by section 5 on page 3 of the 5/7/01 Office action, because he does not know what the examiner means with the reference to a "monitoring configuration". The examiner is using the term in the same manner that applicant has used it in the specification at the bottom of page 15 and the top of page 16. Applicant must comply with the election of species requirement in said section 5 of the 5/7/01 Office action.

For applicants response to be complete, applicant must provide a listing of all claims readable on each of the elected species."

[Unsigned, unnumbered Notice from Mr. Harvey E. Behrend, 1/16/02]

First, the Examiner's request or election of disclosed species is not proper in light of 35 USC §121 because use of different monitoring configurations may make the inventions related, and such related inventions may not be patentably distinct. Therefore the Examiner's theory of a need for restriction is not proper under 35 USC §121.

12. Second the Examiner's request or election of a monitoring configuration for purposes of examination is not proper in light of MPEP 808.02 because the Examiner has not established reasons for insisting upon his latest restriction in defiance of the record already made by Applicant and Examiner Wasil.

"Where the related inventions as claimed are shown to be distinct...the examiner, in order to establish reasons for insisting upon restriction, must show by appropriate explanation one of the following: (A) separate classification thereof; (B) a separate status in the art when they are classifiable together; (C) a different field of search"

"Where, as disclosed in the application, the several inventions claimed are related, and such related inventions are not patentably distinct as claimed, restriction under 35 USC §121 is never proper. If applicant optionally restricts, double patenting may be held." [MPEP §808.02]

13. Therefore, Applicant has stated at least two (2) reasons why the requirement should be withdrawn or modified. Applicant has pointed out errors in the Examiner's action. Not one of these issues has been responded to by the Examiner, despite the fact that there was Obligation on the Examiner to respond, because Applicant satisfied his burden by citing the above issues.

14. Applicant elects the monitoring configuration described in the specification on pages 5 through the top of page 15, with means to enable a mechanical vibration of the material, providing means to produce the vibration, and means to detect the frequency of said vibration using the displacement (page 7) of the electrode. All claims read on the elected species. Applicant hereby preserves the Right of Petition.

COPY

NO RESPONSE TO APPLICANT'S REQUEST FOR SUGGESTIONS

15. Applicant requested constructive assistance and suggestions from the Examiner in drafting one or more acceptable claims [pursuant to MPEP 707.07(j)] and in making constructive suggestions [pursuant to MPEP 706.03(d)] on 1/31/01. The Examiner has not complied. Applicant again respectfully requests constructive assistance and suggestions from the Examiner in drafting one or more acceptable claims [pursuant to MPEP 707.07(j)] and in making constructive suggestions [pursuant to MPEP 706.03(d)].

16. The U.S. Supreme Court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)]. In the present application, the Examiner appears to be attempting to coerce double patenting despite a record at the Office and said Honorable Court. Attention of the Office and Court is directed to the fact that this has continued even after Applicant cited violations by the Examiner in this matter of MPEP §808, 37 CFR 1.142, and *Diamond v. Diehr* [450 U.S. 175 (1981); 450 U.S. 175, No. 79-1112, 3/3/81] on 1/31/01.

Applicant has fully complied with each and every of the Examiner's requests of the Office's Notice dated 1/16/02.

Respectfully,



Mitchell R. Swartz, ScD, MD, EE
Post Office Box 81135
Wellesley Hills, Mass. 02481

Certificate Of Mailing [37 CFR 1.8(a)]

February 12, 2002

To Whom it Does Concern:

I hereby certify that this correspondence will be deposited with the United States Postal Service by First Class Mail, postage prepaid, in an envelope addressed to

"The Commissioner of Patents and Trademarks
Washington, D.C. 20231" on the date below.

Thank you.

Sincerely,

February 12, 2002

M.R. Swartz

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

COPY

IN RE THE APPLICATION OF:

Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00

For: **METHOD AND APPARATUS
TO MONITOR LOADING
USING VIBRATION**

PAPER: 6 (Applicant's Count)

Group Art Unit: 3641

Examiner: Behrend, H.

EXHIBIT "D"

This is a continuation of Serial no. 07/ 371,937

Filed: 06/27/89

February 12, 2002

Commissioner of Patents and Trademarks
Washington, D.C. 20231

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OFFICE OF PETITIONS

**PETITION TO THE COMMISSIONER
PURSUANT TO 37 C.F.R. 1.181**

1. This Petition is made pursuant to 37 C.F.R. 1.181 to the Commissioner of Patents, and is made to invoke his supervisory authority to correct the situation with respect to the recent unsigned unnumbered Office Notice [Exhibit "A" attached, as described below]. Pursuant to 37 C.F.R. 1.181, there is no fee. This Petition is reasonable based upon the reasons stated below and confirmed by the facts as discussed in the Declaration supporting this Petition.

2. In the discussion below, reference is made to Declaration of Dr. Mitchell Swartz (hereinafter called the "Swartz Declaration") dated January 22, 2002.

COPY

IN RE THE APPLICATION OF:

Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00

For: **METHOD AND APPARATUS
TO MONITOR LOADING
USING VIBRATION**

PAPER: 7 (Applicant's Count)

Group Art Unit:3641

Examiner: Behrend, H.

EXHIBIT "E"

This is a continuation of Serial no. 07/ 371,937

Filed: 06/27/89

February 12, 2002

**DECLARATION OF DR. MITCHELL SWARTZ
SUPPORTING PETITION**

I, Mitchell R. Swartz, declare that I am a citizen of the United States of America and the inventor of the invention described in the above-entitled application.

1. With respect to the above-entitled and other of Applicant's applications, there does not appear to have been serious and substantive compliance by Mr. Harvey Behrend either with the record of the Office, with the past Decision of the Board, with the past Decision by the Federal Court, or with the Rules and Guidelines under which Mr. Harvey Behrend presumably operates.

2. Mr. Behrend has "taken" all my applications in what appears to be retaliation for a Federal lawsuit.

3. In the above-entitled action, and in at least three other of my applications, which have been "taken" by Mr. Behrend, he has demonstrated a show-no-care attitude for the record, rules, and guidelines.

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OFFICE OF PETITIONS

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE THE APPLICATION OF:

Inventor : Mitchell R. Swartz

Serial no. 09/ 750, 480

Filed: 12/28/00

For: **METHOD AND APPARATUS
TO MONITOR LOADING
USING VIBRATION**

This is a continuation of Serial no. 07/371,937

Filed: 06/27/89

PAPER: 7 (Applicant's Count)

Group Art Unit:3641

Examiner: R. Palabrica

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OFFICE OF PETITIONS

October 23, 2002

**DECLARATION OF DR. MITCHELL SWARTZ
SUPPORTING PETITION TO THE COMMISSIONER**

I, Mitchell R. Swartz, declare that I am a citizen of the United States of America and the inventor of the invention described in the above-entitled application.

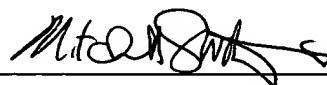
1. In the above-entitled application, I received a "Notice Of Abandonment" [Exhibit "A" attached, hereinafter "Notice"] dated 9/9/02 and just received, purporting incorrectly that the above-entitled Application has been "*Abandoned*" because of a purported "failure to timely file a proper reply to the Office letter mailed on 16 January 2002". This is absolutely untrue. There was a Reply, and it was received by the Office. This Applicant has NEVER abandoned this patent application. No communication to the Office from the Applicant has ever used the word "abandonment".

2. I submitted a Response to the Office's Action which was dated 1/16/02 and was unsigned and unnumbered. The datestamp of the Patent and Trademark Office (Exhibit "B", attached) indicates that the pleading with said Exhibits was received and docketed 3/1/02.

3. Also submitted with the Response (Exhibit "C") was a Petition to the Commissioner under 1.181 (Exhibit "D", attached), accompanied by a supporting Declaration (Exhibit "E", attached). These additional important pleadings were received at the Patent and Trademark Office as proven by the Office's datestamp (Exhibit "B").

4. The datestamp of the Patent and Trademark Office [Exhibit "B"] heralds receipt of Applicant's Response to the Office's Action dated 1/16/02, which was unsigned and unnumbered, and this indelibly demonstrates that there was no abandonment.

Respectfully,



Mitchell Swartz, ScD, MD, EE
Post Office Box 81135
Wellesley Hills, Mass. 02481

I declare that all statements herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

Signature of Inventor:



October 23, 2002

Mitchell R. Swartz, ScD, MD, EE
Post Office Box 81135
Wellesley Hills, Mass. 02481